Office-Supreme Court, U.S.
FILED
AUG 18 1966
JOHN F. DAVIS, CLERK

No. 455

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966.

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**RAYMOND O. SOPHER, JOHN A. RAMZA, MICHAEL F. RYAN and MATTHEW TIBBLES,**

*Petitioners,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA review 5-6581

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**RAYMOND O. SOPHER, JOHN A. RAMZA, MICHAEL F. RYAN and MATTHEW TIBBLES,**

*Petitioners,*

VS.

**UNITED STATES OF AMERICA,**

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioners, Raymond O. Sopher, John A. Ramza, Michael F. Ryan and Matthew Tibbles, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

### OPINION FROM THE COURT BELOW

The United States Court of Appeals for the Seventh Circuit affirmed petitioners' convictions on June 20, 1966. The opinion has not yet been reported. It is printed with this petition as Appendix A.

## JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 20, 1966. Rehearing was denied on July 19, 1966. The jurisdiction of this court is invoked under Title 28, U.S.C., Section 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

1. Where a prospective witness is equipped with a hidden tape recorder by the FBI before meeting a defendant, and then under the observation of the FBI, talks to the defendant, immediately following which the defendant is arrested by the observing agents, immediately following which the witness turns the taped conversation over to the FBI, then is that conversation thus taped a statement required to be produced under 18 U.S.C. 3500, where that statement consists primarily in an account by the witness of his own version of his previous dealings with the several defendants on trial?

2. Where the government witnesses have, during the course of an alleged conspiracy, made tape recordings of allegedly damaging conversations between themselves and the ultimate defendants, to which conversations the witnesses testify, can the trial court properly quash defense subpoenas designed to secure production of the recordings for use as evidence during the presentation of the defense?

3. Is a defendant deprived of effective assistance of counsel, and of a fair trial, where the trial judge permits the government to argue to the jury that such defendant stipulated he lied on the witness stand, holds defense counsel in contempt of court when defense counsel states the actual stipulation to the jury, and further, by means of threats to punish defense counsel, requires defense counsel

to withdraw his previous remarks to the jury, and requires defense counsel to substitute remarks in tenor with the trial judge's and prosecutor's view of things.

Is the Court of Appeals correct in ruling that the defendant waives his right to have it urged to the jury that he testified truthfully, when under compulsion of the judge's threats his lawyer withdraws from the jury's consideration an interpretation of the evidence consistent with his veracity, substituting instead an interpretation favored by the judge and prosecutor?

Where counsel for the central defendant in a conspiracy case is compelled by the threats of the trial judge to present the case to the jury in the light most favorable to the prosecution, are not all defendants improperly prejudiced?

## CONSTITUTIONAL PROVISIONS INVOLVED

In relevant part, the Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

## STATUTORY PROVISIONS INVOLVED

In relevant part, statutes provide:

18 U.S.C. 1951 (a) Whoever . . . obstructs . . . the movement of any article . . . in commerce . . . by extortion . . . [shall be punished] . . .

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of . . . fear . . .

18 U.S.C. 3500 (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. • • •

## STATEMENT OF THE CASE.

Petitioners Sopher, Ryan, Ramza, and Tibbles were, respectively, the mayor and the commissioners (city council) of Streator, Illinois. They, and a fourth commissioner (Kerestes) were jointly indicted and tried in the Northern District of Illinois on a substantive count charging obstruction of interstate commerce by extortion and a second count charging a conspiracy to commit the substantive offense.

All defendants were found guilty after a jury trial. Defendant Sopher was sentenced to four years imprisonment, each of the other defendants to three years.

The United States Court of Appeals affirmed the convictions and denied the petitions for rehearing on June 20 and July 19, 1966, respectively.

## STATEMENT OF FACTS.

According to the government's evidence, in 1960 the City of Streator required extensive additions and repairs to its sewage system. Independent consulting engineers were retained to draw plans and interested suppliers of

equipment sought to obtain favorable consideration of their own products by the mayor and the commissioners. Smith & Loveless of Lenexa, Kansas, urged use of their "package lift stations" in the system. Stannard Power and Equipment, of Chicago was the local Smith & Loveless sales agent.

In March and April, 1961, according to the government, Sopher on two occasions and Kerestes on one, told Boender and Bowlby, Stannard employees, and B. Alden Smith, managing director of Smith & Loveless, that the latter's equipment would be used if they agreed to pay 10% of the successfully bidding contractor's price for the equipment, in cash.

Smith made no commitment, but left Sopher with the impression that he would go along. Thereafter general contractors bid the project and on June 7, 1961, the low bidder was awarded the contract. On July 8, 1961, Smith & Loveless got an order from the general contractor for lift stations for $30,868. In February, 1963, after the work was completed, Smith & Loveless received final payment from the contractor. Sopher made arrangements to meet Smith but failed to appear at that meeting. Later, another meeting was arranged.

On May 7, 1963 Smith, carrying a concealed tape recorder, gave money previously identified by the FBI to Sopher in Chicago. Before passing the money, Smith, as recorded on the secret tape, stated to Sopher his version of their arrangements. When Smith handed an envelope containing $3,087 to Sopher, Sopher was arrested by FBI agents. Sopher protested at once that Smith had made a political contribution.

The defense evidence differed in material particulars.

Defendant Kerestes denied knowledge of the arrangement championed by the government's evidence, indeed he had rejected an effort by Smith to corrupt him (A. 54-55).

Defendant Sopher likewise denied the arrangement fit the government format, explaining that the offer had originated from Stannard and Smith & Loveless in the form of a suggestion that if their stations were used "they" would like to help the defendants at election time in the form of 10% of any business they got in the area (A. 41). After Smith & Loveless was paid in full, Sopher met Smith following Smith's several entreaties to meet him (A. 43).

• • •

Matters relating to the revelation of the existence of the secret tape during the testimony of Sopher, a stipulation regarding it, and the ultimate contempt judgment against counsel for Sopher are detailed as relevant in the argument.

## REASONS FOR GRANTING THE WRIT

### I.

**18 U.S.C. 3500 (the Jencks Act) was not complied with in that a secret tape recorded statement by the government's principal witness was not produced upon demand at the conclusion of his testimony, on the ground that one of the defendants was present when the statement was made, and that one of the acts charged in the indictment was in part evidenced by the content of the statement.**

B. Alden Smith testified during the government's case in chief that after Smith & Loveless was paid in full for completing its delivery of machinery to Streator, he met Mayor Sopher in Chicago. After a short conversation he handed an envelope containing money to Sopher. The agents arrested Sopher when he pocketed it.

He did not originally testify that he carried a secret recording device for the FBI at the time of the conversation. That was first revealed in Sopher's cross examination, when the prosecutor asked Sopher questions in the form of long, verbatim quotations from a transcript made from the tape.

The quotations (A. 46-50) consisted in recitations by Smith for the benefit of the tape and the FBI. They revealed how Smith wanted *his* version of his previous dealings to be understood once the defendants were in court.

Thus Smith contrived to get the several defendants into "this deal on this payoff thing" (A. 46) implied long standing culpability in the defendants by asking why "you fellows ever start[ed] doing that sort of thing" (A. 47) cleared his own skirts by complaining that it would "make a tough cruel world" if he regularly had to do business

that way (A. 48) stated that the agreement "was 10%" (A. 48) that it made him nervous and how he had had to scrimp to fool internal revenue (A. 48-49) and told Sopher of payoffs in Las Vegas which took the form of gambling losses (A. 49-50). The entire thrust of Smith's conversation was to place himself in the most innocent of lights, the defendants in the most guilty. Sopher's responses were largely ambiguous or noncommittal.

The trial judge overruled objections based on the government's failure to provide the defense with a transcript following Smith's direct examination as 18 U.S.C. 3500 would seem to command. He likened the recording to a photograph of the meeting, which the government would not have to turn over following Smith's direct examination (A. 51).

The Court of Appeals rejected the trial judge's analogy. They arrived at the same result however. By re-writing the statute in a manner thought to exclude the present case. According to the court's new definition, statements under the act are " . . . *recital[s] of a past occurrence by a prospective witness* . . ." (Emphasis, the court's). Besides, said the court, the statement on the recording was not made " . . . *to an agent of the government* . . ." (Emphasis, the court's).

Even if the court were right as to the content of the statute, the recording in fact consisted in recitals of past occurrences—at least declarant Smith's version of them. And of course they were made by a prospective witness. Not just any witness. The star witness. And of course they were made to government agents. The agents supplied the device and the tape, and Smith returned the entire rig to them upon Sopher's arrest.

The position taken by the government portrays only an attempt by the government (thus far successful) to thwart the language of the Jencks Act.

## II.

**Secret tape recorded statements of conversations between defendants and government witnesses made during the occurrence of the events alleged in the indictment were put by the court beyond the reach of defense subpoenas, although material to the matters alleged in the indictment.**

When the trial judge likened the tape recording of the Smith-Sopher conversation to a photo, a subpoena was served upon the government demanding its production under the compulsory process portion of the Sixth Amendment.

Not only was the tape and transcript of the Sopher-Smith conversation sought. So also were the tapes and transcripts of government witnesses Smith, Boender, and Bowlby made on four specific dates when they testified they had talked to the defendants (A. 53).

The trial judge said the defense was not entitled to subpoena government evidence. It was pointed out to him that the government made no claim of privilege (A. 53-54). He quashed the subpoena. He deprived the defense of evidence which the defense thought might tend to exculpate the defendants.

In *Brady* v. *Maryland,* 373 U.S. 83, this Court recently upheld the right to disclosure of evidence in the hands of the state. Yet it commended itself to the trial judge here that the United States is privileged not to respond to the force of the Sixth Amendment. The language of *United States* v. *Andolschek,* 2 Cir., 142 F. 2d 503, 507 (1944) is hard to improve upon: "The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully."

The entire concept of the government's retaining evidence which may tend to free a defendant is unwholesome and obnoxious.

It is true that in the case of the Smith-Sopher conversation, the government brought the document to light, brought it to light after the defense had rested so that little use could be made of it. Not even that was done in the case of the other recordings.

For aught it appears, those other recordings, whose existence the government has never denied (though called upon to do so if they do not exist) will demonstrate that Sopher's version of the arrangement is true; and that suggestions of payment for preferential treatment were originated by Smith & Loveless, not by the defendants.

## III.

**All defendants were prejudiced when the attorney for one of them was required by the trial judge to argue to the jury in favor of the prosecution's theory of the evidence, at the cost of suffering a worse penalty than the $1,000 contempt fine ultimately imposed upon him, for arguing a theory of the defense which, though helpful to his client, and supported in the record, was distasteful to the judge and prosecutor.**

B. Alden Smith testified to a conversation with Mayor Sopher. Sopher, in defense related his version, differing slightly from that given by Smith. On the cross examination of Sopher, the government removed from its sleeve a tape recorded version, asking Sopher detailed questions purporting to be verbatim extracts from the tape. As to all or nearly all of the quotations, Sopher said that he did not recall their having been included in the conversation (A. 45-50).

It was thereafter stipulated that the statements as put by the prosecutor's questions were on the tape. Counsel for Sopher said he could stipulate that the parts read by the prosecutor were *part* of the conversation. Obviously counsel could not stipulate that they were the *entire* conversation, because Sopher had testified to some differences. To have stipulated otherwise would have been to stipulate that Sopher had perjured himself. It was thus arguable that the portions on the tape were correct (and it was so stipulated) and it was *still* arguable that what Sopher remembered was likewise true, but had not been recorded.

Smith resumed the stand on the government's rebuttal and admitted that he could have interrupted the tape, but denied that he did (A. 57-58). Defense counsel was not to be saddled with the truth of Smith's denial. Especially in light of the testimony of the FBI agent that he could not tell, from listening to the recording, that everything which occurred at the meeting was recorded (A. 58).

The prosecutor argued to the jury that Sopher had stipulated that he lied. Defense counsel promptly objected that when Sopher had stipulated that certain facts were true, he had not stipulated that something else was a lie. The judge overruled the objection (A. 59-60).

Counsel for Sopher sought to explain that while the tape was accurate and Sopher's version likewise accurate, Sopher's version was not on the tape, because Smith could interrupt the recorder when conversation not to his liking occurred (A. 60-61). It was likewise pointed out, truthfully (A. 63) that the government had stipulated that what the jury had heard was but part of the tape. Although counsel for Sopher had sought to explain the *absence* of the Sopher version from the tape, the judge said that counsel had stated "categorically" that Sopher's version would be corroborated by the tape (A. 63).

The jury was recessed in excess of two hours, during which the court threatened counsel (A. 62). Under compulsion of those threats the court required counsel to state to the jury upon its return that the record would not sustain his previous argument that the tape was interrupted (A. 67).

The Court of Appeals regarded this withdrawal by Sopher's attorney as a waiver by Sopher of his right to complain of the harm done him in having his lawyer tell the jury that the prosecutor's interpretation should be followed. Sopher was deprived of the effective assistance of counsel at the very instant his own lawyer surrendered to the court's requirement that his lawyer join the prosecution team.

Furthermore, every defendant in the courtroom was injured when one defendant's attorney was required to defect, in the presence of the jury. The jury knew nothing of the compulsion. They were elsewhere during the harangue. But they were present when the defense, as embodied by Sopher's counsel, told them that defense counsel were not to be trusted.

Right to counsel is denied where a lawyer is required to represent conflicting interests. *Glasser* v. *United States,* 315 U.S. 60, 70. *A fortiori,* the denial is worse where what is created by the trial judge is a direct conflict in the interests of the lawyer on the one hand and the defendant on the other. The threats of the trial judge here which created the conflict of interest were not idle vaporings. For his temerity in drawing what the trial judge felt to be an unjustified inference, counsel was adjudged guilty of a crime and fined $1,000. That counsel's conviction was reversed on appeal (*In re Oliver,* 347 F. 2d 415) is cold comfort to the client who, pragmatically, is justified

in wondering at the extent at which his conviction resulted from his lawyer's selfish balancing of competing interests.

We do not urge that a judge may never properly compel a lawyer. But we do urge that where a lawyer acts under the compulsion of threats by the courts to injure counsel, the court compels at its peril so far as any supposed waiver by the client is concerned. In short, waiver and compulsion are contradictory, so that the former cannot be predicated upon the latter.

Thus when Sopher's lawyer announced to the jury that he conceded the essential soundness of the prosecutor's position, it did not follow that Sopher adopted the position. Indeed it is to be doubted that Sopher changed his mind and believed the tape recording was complete because of threats made to his lawyer.

Accordingly, in the most literal sense, Sopher was deprived of counsel, the judge having converted his lawyer into a prosecutor by making him advance to the jury a position that was essentially that of the government.

* * * *

## CONCLUSION

For the foregoing reasons, and for those applicable to them advanced by their co-petitioner, John Kerestes, your petitioners urge that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

FRANK W. OLIVER
*Attorney for Raymond O. Sopher*

CHARLES A. BELLOWS,
*Attorney for John A. Ramza, Michael F. Ryan, and Matthew Tibbles*

In the

# United States Court of Appeals

## For the Seventh Circuit

Nos. 15057-15061

SEPTEMBER TERM, 1965—APRIL SESSION, 1966

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

RAYMOND O. SOPHER, JOHN KERESTES, JOHN A. RAMZA, MICHAEL F. RYAN and MATTHEW J. TIBBLES,
*Defendants-Appellants.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 20, 1966

Before DUFFY, SCHNACKENBERG and KNOCH, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Raymond O. Sopher, John Kerestes, John A. Ramza, Michael F. Ryan and Matthew J. Tibbles, defendants, appeal from their convictions of a violation of 18 U.S.C. § 1951. They were tried by a jury and the court sentenced them to prison terms.

Sopher was the mayor of Streator, Illinois, and his co-defendants were commissioners thereof.[1]

[1] 24 Ill. Rev. Stat. 1965, art. 4.

Count I of the indictment charged defendants with having obstructed interstate commerce by extortion and count II charged them with conspiracy to commit the offense charged in count I, all in violation of the Hobbs Act, 18 U.S.C. § 1951.

There was evidence tending to prove the following facts:

On November 7, 1960, Charles H. Boender, a sales representative of Stannard Power Equipment Company, which was agent in Streator for Smith & Loveless, made a sales talk to said defendants on a proposed sewer project in that city. Whereupon Sopher asked Boender "what it was worth" to him to get the job. An unidentified commissioner stated that "it must be in cash".

On January 5, 1961, independent engineers Warren & Van Praag, Inc., submitted plans and specifications for the project, wherein Smith & Loveless was designated as the base bid supplier for the package lift stations.

On March 28, 1961, in Boender's presence, president Bowlby of Stannard thanked Sopher for the consideration being given Smith & Loveless equipment and expressed the hope that the company was going to be successful in doing business with the contractor. Sopher replied that this was possible, provided they received in cash 10% of the contract or bid price in connection with such an agreement. In addition Sopher suggested that the price could be increased by $3,000 to take care of the internal revenue tax. However, Bowlby told Sopher that Stannard Company could not participate but that he would relate the proposition to Smith & Loveless.

On April 10, 1961, Boender and Smith, managing director of Smith & Loveless, met in Streator. Being unable

to locate Sopher, they called on defendant Kerestes, who said he had explained to Boender previously that "we wanted 10 percent of your bid price to the contractor to have the city approve" the use of Smith & Loveless equipment. When Smith asked how "we might accomplish the matter of providing this money" Kerestes explained: "* * * we want the cash, we want it tax paid, and it is your problem how you get it. * * *"

Finding Mayor Sopher at the city hall, Boender and Smith were told by him: "We want 10 percent of the bid price in cash." While Smith made no commitment, he testified that he left Sopher with the impression that "I probably would [go along with the deal]", thus leaving the matter in abeyance so that the Federal Bureau of Investigation could be contacted, which was done on April 11, 1961.

On April 17, 1961, Farthing Brothers, general contractors, after having received bids from the subcontractors, made sealed bids on pump stations manufactured by Smith & Loveless, Chicago Pump Company and Tex-Vit. Farthing Brothers was the lowest bidder on the total sewage project.

On April 19, 1961, Boender telephoned Sopher and asked whether he was satisfied with the arrangements made between Sopher and Smith. Sopher said that he was and that he would have to satisfy "the commissioners".

On June 7, 1961, a contract was entered into between the city and Farthing Brothers in which Smith & Loveless was the only subcontractor specifically named. Both Boender and Smith believed that Smith & Loveless received the contract because of the agreement to pay the 10% of its contract price of $30,868.

On February 15, 1963, Smith & Loveless received its final payment from Farthing Brothers and three days later Sopher called Boender to arrange a meeting.

On May 7, 1963, Smith, Sopher and his twelve-year-old daughter met in a room in a Chicago hotel. On Smith's person federal agents had a hidden recording device, and $3,087 in identified money. The recorded conversation thereon is in conformity with the facts herein enumerated, culminating in Smith's statement "* * * well, I might as well give you the money," (which he did). Federal agents then appeared, arrested Sopher and recovered the listed money. Whereupon Sopher contended the money received was a political contribution.

1. We hold that the evidence supports the charges in the indictment and that the indictment includes all elements of the offenses charged.

As the Supreme Court said in *Stirone* v. *United States*, 361 U.S. 212 (1960) at 215:

> "* * * It was to free commerce from such destructive burdens that the Hobbs Act was passed. *United States* v. *Green*, 350 U.S. 415, 420."

and at 218, the court added:

> "* * * there are two essential elements of a Hobbs Act crime: interference with commerce and extortion. * * *"

We agree with government counsel when they say that the conduct of defendants necessarily produced a fear of economic loss by Smith & Loveless. *United States* v. *Kramer*, 7 Cir., 355 F.2d 891, 897 (1966).

We hold that the violations of the Hobbs Act charged in the indictment were supported by the proof in the record.

2. However, defendants contend that the transcript and tape recording of the conversation on May 7, 1963 between Smith and Mayor Sopher were statements producible under 18 U.S.C.A. § 3500. There were motions by the defense to strike the testimony of Smith, grant a mistrial, and to produce said statements, which were respectively denied.

While the record indicates that the government turned over to the defendants various statements of witnesses in compliance with § 3500, it took the position below and also in this court that the court did not err in denying defendants' motion for the production of the tape recording of the May 7, 1963 conversation and the transcript thereof. The district court took the position that § 3500 does not encompass the tape recording of that conversation.

A § 3500 statement is a recorded recital of past occurrences made by a prospective prosecution witness. From the very nature, necessarily it is made after those events have taken place. If a prosecutor, in reliance on the statement, uses as a witness the maker thereof as a part of the government's case, the statement must be produced for the use of defense counsel. But a concurrent tape recording of a conversation between the payer and the recipient of an alleged cash bribe is obviously of contemporaneous sounds. The result is a preservation of a conversation just as it was spoken. It is direct evidence relevant on the issue of the alleged guilt of the defendants on trial. Made when the allegedly extorted bribe money was being paid, the tape recording in this case is of the actual voices of the briber and the bribee. It is therefore *not a recital of a past occurrence by a prospective witness* and is not within the general purview of § 3500. More-

over, it does not fall within the technical requirements of paragraph (e)[2] thereof, because it is not a written statement made and signed by a government witness or adopted or approved by him, nor is it a recording or transcription thereof which is a substantially verbatim recital of an oral statement by said witness *to an agent of the government,* contemporaneously recorded with the making of such oral statement.

We hold that there was no error committed in the denial of the motions of defendants to strike Smith's testimony and for an order for production of said statements, or to grant a mistrial.

3. During the government's case in chief, Smith testified as to the May 7, 1963 conversation with Sopher at the Water Tower Inn. Sopher, as a defense witness, under cross-examination answered evasively when asked about statements contained in the recording attributed to him by Smith, who testified that he recognized Sopher's voice when the playing of the tape was repeated.

A transcript of the tape had been delivered by the government to defense counsel at their suggestion. The tape was played in their presence, but outside the presence of the jury and of any spectators, after the defendants severally and personally agreed to the procedure.

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[2] § 3500 (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. * * *

Counsel for Sopher assumes in this court that "certain parts of the conversation as testified to by Sopher, were not on the tape" and he points out as "a possible explanation" that he reminded the jury that Smith controlled the operation of the recording device "and could" delete statements by Sopher which were not to his liking, by pushing the "off" button. Sopher's counsel points out that the Federal Bureau of Investigation agent had instructed Smith in the mechanical use of the recording device.

On rebuttal by the government, Smith testified that the tape recording fully, truly and accurately portrayed the conversation with Sopher on the occasion in question. He further testified that only general instructions regarding the operation of the device were given. Moreover, the lack of a basis for the attack on the reliability of the tape was acknowledged by counsel for Sopher, when he then stated:

> "Vis-a-vis my comments just before the recess, I should like the jury to understand that in my opinion the record will not sustain the inference that the machine which Mr. Smith had fastened to his body on May 7, 1963, was in fact turned on or off by Smith during that conversation, and I think it also will not sustain the inference that there was matter on that tape which tended to corroborate Mayor Sopher's version of the conversation but which was not stipulated to."

As a matter of fact, our attention has not been directed to any conversation on the occasion in the Water Tower Inn which the tape failed to record. It is therefore improper for us to speculate what would be missing from the record if Smith had arrested the operation of the machine temporarily at any time.

4. Defendant Kerestes contends that the court erred in failing to grant him a severance from Sopher, on the ground that the latter had made admissions and statements tending to implicate Kerestes, and also that he was unable in a joint trial with Sopher to compel effective testimony from his co-defendant. We fail to find sufficient basis in the record for reversing, especially as all defendants were charged as members of a conspiracy under count II of the indictment. Certainly the matter of a severance was within the sound discretion of the district judge and there is nothing in the record to indicate an abuse of such discretion when the motion for severance was overruled. *Opper* v. *United States*, 348 U.S. 84, 95 (1954).

We find no other ground advanced by Kerestes for a reversal sufficient to justify that action.

5. Under all the circumstances shown by the record, we hold that the court properly denied the respective motions for severance, judgment of acquittal, mistrial and a new trial by defendants Ramza, Ryan and Tibbles.

We have considered their contentions that there was a fatal variance between the indictment and the proof. Their counsel reason that the indictment alleged defendants threatened Smith & Loveless, Inc. that its bid would not be accepted unless it agreed to make a payment to them, whereas the evidence showed that Smith & Loveless only made a proposal to the general contractor for the work. We find there was evidence tending to prove that defendants' conduct necessarily produced a fear of economic loss by Smith & Loveless. This evidence is sufficient to support the jury's verdict, on the theory that money had been extorted by defendants by fear, induced by threats that a bid of the contractor would not be accepted unless Smith & Loveless agreed to pay 10% of the bid price, thereby affecting interstate commerce.

6. We have examined the instructions and considered the objections thereto raised by defendants in this court. We find the objections not well taken.

7. While there is a criticism of the action of the trial court, in what counsel for defendants Ramza, Ryan and Tibbles say was a reprimand of Sopher's trial counsel, our reading of the entire transcript convinces us that it was not prejudicial to the defendants in any way.

8. Defendants Ramza, Ryan and Tibbles contend that the court committed error in admitting in evidence conversations at the May 7, 1963 meeting between Sopher and Smith which were made "after the completion of the conspiracy." However, we do not agree that the conspiracy had ended when these conversations took place. The conspiracy was still in effect when the meeting took place, the money was obtained by Sopher, and each of the participating persons (Sopher and Smith) continued in their discussion as to the payment of the money to Sopher and its subsequent disbursement to the other defendants in their respective shares. The conspiracy did not terminate until the arrest of Sopher.

For all these reasons, the judgments from which these appeals were taken are affirmed.

*Judgments affirmed.*

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 451

JOHN KERESTES, PETITIONER

*v.*

UNITED STATES OF AMERICA

No. 455

RAYMOND O. SOPHER, JOHN A. RAMZA, MICHAEL F. RYAN AND MATTHEW TIBBLES, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. No. 451 App. A; Pet. No. 455 App.; C.A. 1–8) [1] is reported at 362 F. 2d 523.

[1] "C.A." refers to the record of the proceedings in the court of appeals. "R." refers to the volume containing the various papers filed in the district court. "Tr." refers to the three-volume, typewritten transcript of the trial proceedings.

## JURISDICTION

The judgment of the court of appeals was entered on June 20, 1966. Petitions for rehearing were denied on July 19, 1966. The petition for a writ of certiorari in No. 451 was filed on August 17, 1966, and the petition for a writ of certiorari in No. 455 was filed on August 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in denying severance as to petitioner Kerestes.

2. Whether prejudicial error occurred by reason of the fact that the government, while delivering to the defense eight written statements by a government witness pursuant to 18 U.S.C. 3500, did not then deliver a transcript of a wire recording of a conversation between the witness and petitioner Sopher, where the transcript of the recording was thereafter delivered to the defense and the defense made no request to recall the witness for further examination.

3. Whether a mistrial was required because the trial court interrupted the final argument of counsel for petitioner Sopher to state that counsel was arguing inferences which were not warranted by the evidence, where, after a conference, defense counsel agreed that the inferences were not warranted.

## STATEMENT

Petitioners were convicted by a jury, in the United States District Court for the Northern District of Illinois, under a two-count indictment charging that

they obstructed, delayed, and affected interstate commerce by extortion, and that they conspired to do so, in violation of the Hobbs Act, 18 U.S.C. 1951.[2] On December 1, 1964, petitioner Sopher was sentenced to imprisonment for four years; the other petitioners were each sentenced to imprisonment for three years (R. 298–302). The court of appeals unanimously affirmed the convictions.

1. The evidence disclosed that in 1960 petitioner Sopher was the mayor of Streator, Illinois, and petitioners Kerestes, Ramza, Ryan and Tibbles were commissioners of the city. In November 1960, petitioners met in the mayor's office with one Boender, a representative of a company acting as a sales agent for Smith and Loveless, a Kansas-based firm which manufactured pump equipment (Tr. 14–15, 49, 270–271). After Boender explained the use of such equipment for a proposed sewer project by the city, petitioner Sopher asked Boender what it was worth to him to get the job (Tr. 19). One of the other petitioners stated that "it must be in cash" (*ibid.*). Boender said he would discuss the matter with his superiors (*ibid.*).

In March 1961 Boender and one Bowley, the president of the sales agency, met with petitioner Sopher and indicated that they hoped Smith and Loveless

[2] "Conduct that brings about a state of mind of fear of financial loss constitutes extortion under the Hobbs Act." *United States* v. *Kramer*, 355 F. 2d 891, 897 (C.A. 7), vacated and remanded in part for entry of an appropriate sentence, 384 U.S. 100. See also *United States* v. *Dale*, 223 F. 2d 181, 183 (C.A. 7); *United States* v. *Postma*, 242 F. 2d 488, 492 (C.A. 2), certiorari denied, 354 U.S. 922. See note 12, *infra*.

would be chosen to supply the pump equipment for the sewer project (Tr. 19–21, 239–241). Petitioner Sopher said this would be possible if he and the commissioners received ten percent of the bid price in cash (Tr. 26, 241–242). Bowley replied that his company could not participate in such an arrangement, but stated that he would relate the proposition to Mr. Smith, the managing director of Smith and Loveless (Tr. 26, 242, 270).

On April 10, 1961, Smith, accompanied by Boender, met petitioner Kerestes in Streator and stated that he did not understand what was expected in order to secure the use of Smith and Loveless pump equipment for the sewer project (Tr. 28, 271–274). Petitioner Kerestes explained "[W]e wanted 10 percent of your bid price to the contractor to have the city approve [Smith and Loveless] equipment on the job. * * * [W]e want the cash, we want it tax paid, and it is your problem how you get it" (Tr. 275; see Tr. 32). Immediately thereafter Smith and Boender talked to petitioner Sopher at the city hall (Tr. 30, 275–276). Petitioner Sopher confirmed that "We want 10 percent of the bid price in cash" (Tr. 32). Smith felt that his firm had no chance of obtaining the pump contract without paying the ten percent (Tr. 282–283). He made no commitment to Sopher, but suggested that he probably would comply (Tr. 32, 276). The next day Smith reported the matter to the F.B.I. (Tr. 276–278).

On May 1, 1961, after three potential pump suppliers had submitted their bids to the general contractors, and after the city had received the bids of the general contractors for the complete sewer project

(Tr. 630), Boender telephoned petitioner Sopher and asked if he and the commissioners were satisfied with the arrangements made with Smith (Tr. 35–36). Petitioner Sopher indicated that some of the commissioners were not entirely satisfied, and asked Boender to come to Streator (Tr. 36). That evening, after the regular council meeting, petitioners met privately with Boender in the mayor's office (Tr. 37). After discussing "how they could be sure that Smith and Loveless could be trusted to go along with this deal" and deciding that their power to withhold payment to the general contractor would afford sufficient control, petitioners agreed that Smith and Loveless should be awarded the order for the pumps (Tr. 39).

In June 1961, the city of Streator and the low-bidding general contractor signed a contract for the sewer project in which Smith and Loveless was specifically designated as the supplier of the pump equipment (Tr. 551, 557, 645).[3] Smith and Loveless received the order at its bid price of $30,686 and thereafter delivered and installed the equipment (Tr. 283–284).

In November 1961, petitioner Sopher telephoned Smith and asked if they could meet to complete their agreement (Tr. 284, 286). Smith replied that he intended to wait until his company had received total

[3] The successful general contractor had offered in its bid to use the pump equipment of any of three designated manufacturers, including Smith and Loveless (Tr. 375, 548, 550–551). Although the use of Smith and Loveless pumps had been recommended by the city's consulting engineers (Tr. 592, 596, 636–637), the city council was not bound to accept the engineers' recommendation (Tr. 673–675).